Law Reform Commission of Canada
Commission de réforme du droit du Canada

ADMINISTRATIVE LAW

federal court

JUDICIAL REVIEW

Working Paper 18

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Notice

This *Working Paper* presents the views of the Commission at this time. The Commission's final views will be presented later in its Report to the Minister of Justice and Parliament, when the Commission has taken into account comments received in the meantime from the public.

The Commission would be grateful, therefore, if all comments could be sent in writing to:

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Foreword

Under its research program, the Commission undertook to study the broader problems associated with procedures before administrative tribunals, and it has now issued studies on a number of permanent tribunals, as well as a Working Paper on *Commissions of Inquiry*. As would be expected, one of the broader problems revealed by these studies is the relationship of the tribunals to the courts, and in particular the Federal Court of Canada.

The Commission had planned to give its views on this problem at a later stage, because it believes the question of administrative justice must be faced primarily at the agency level, and it did not wish to overemphasize the role of the courts—an overemphasis which it feels has in the past diverted attention from many of the problems that face administrative tribunals. In view, however, of the growing debate among members of the profession about the jurisdiction of the Federal Court, the Commission decided that it would have an in-depth Background Paper prepared on the subject. That paper is to be published shortly. And although we would have preferred to await further research on other tribunals and the statutory appeals, we decided it would also be helpful if we set forth our tentative views on judicial review at this time. We hope these views will contribute to the debate, and we look forward to comments from the profession and the public generally.

I.

Introduction

Judicial Review Generally

One of the salient features of our constitutional arrangements is the power of the courts to review the action of state authorities for illegality or failure to meet minimum standards of justice. From a very early period, the English courts, with some assistance from the legislature, had developed a number of instruments, notably the prerogative writs, to review the actions of inferior tribunals and other state organs. The best known of these, of course, is the writ of *habeas corpus* under which a person in custody may have the legality of his detention tested and obtain his release if illegally detained. But there are others, and these are more frequently employed in the judicial review of administrative authorities: *certiorari* (to quash orders made without jurisdiction, or in defiance of natural justice); prohibition (to prohibit such orders); *mandamus* (to compel the performance of a legal duty); *quo warranto*—now seldom used because an injunction is more effective—(to restrain a person from acting in an office to which he is not entitled); injunctions (to restrain illegal acts); and declaratory judgments (declarations of right).

The most usual basis for judicial intervention has been that a body has exceeded or abused its statutory powers. The law reports contain examples going back several centuries of instances where municipal by-laws and action by justices of the peace or sewer commissioners were struck down for want of jurisdiction, usually by using the prerogative writ of *certiorari*. The doctrine is applied today to all sorts of officials and administrative bodies. Again, if an agency, although acting within its jurisdiction, fails to comply with

the procedure laid down in a statute—as for example, by failing to give notice or to hold a hearing if required to do so— the courts will hold the act void. But in all these cases, the courts are essentially concerned with legality, not with reviewing the merits of a decision.

The courts have also long intervened to ensure that administrative agencies acted in a fair and reasonable manner where no other remedy is available. In exercising this jurisdiction they developed certain minimal standards of fairness, which came to be known as the rules of natural justice. These encompass two fundamental principles: first, that everyone is entitled to a disinterested and unbiased judge; second, that everyone directly affected by a decision must be given adequate notice and an opportunity to be heard. It is inherent in the latter rule that one must be informed of the substance of the case he has to meet. There are innumerable cases in which these principles have been applied to the proceedings of administrative bodies. However, by and large, it became established that the rules of natural justice were limited to bodies whose duty, as determined by the courts, was to decide a dispute on a judicial or "quasi-judicial" basis. The application of this formula has excluded decisions made under circumstances that are categorized as "purely administrative" and this has been the source of some rigidity and confusion to which we will give attention later.

The historical and constitutional importance of judicial review can easily lead one into exaggerating its effectiveness as a means of controlling administrative authorities. In fact judicial review is exercised in only a small fraction of cases. It would frustrate the operation of administrative authorities and overload the courts if it were otherwise. Consequently, the Commission in no way looks upon judicial review as a panacea. Rather, it believes that problems regarding the legality and fairness of administration must be tackled primarily at the level of agency action and procedure and by administrative and (to a lesser extent) political supervision of these actions and procedures. These are matters to which we will return in future Working Papers. We raise them here simply to place our present concern in proper perspective.

But though the most fruitful results in the development of administrative justice are likely to flow from improvements at the administrative level, it by no means follows that judicial review or its effective functioning can be ignored. The review of official and administrative action by the courts on the grounds of legality and

fairness has immense symbolic value: that government and governmental bodies must act in accordance with law and essential fairness. From this symbolic value flows an important educational and leadership role. The courts, from their impartial vantage, have over time created standards by which administrative bodies can test the fairness of their procedures, and Parliament has often dictated procedures on the basis of these standards. Finally, the courts are in many cases the only body that can effectively challenge illegal or arbitrary action of public authorities on behalf of the individual. These are reasons enough to justify the need for judicial review, and the importance of ongoing reform to maintain its efficiency and effectiveness.

The *Federal Court Act*

Until 1971, the supervisory function of the courts over federal administrative authorities was exercised in part by the Supreme Court and the Exchequer Court of Canada pursuant to a number of statutory provisions providing for appeals and in part by the provincial superior courts by means of the prerogative writs. The jurisdiction of the provincial courts gave rise to a number of difficulties. More than one provincial court could, in certain circumstances, exercise jurisdiction over the same subject matter and there was a risk of conflicting interpretations of the constituent statute of an administrative authority by different courts, giving rise to confusion about the authority's powers. Accordingly, when the *Federal Court Act* was enacted in 1971, supervisory jurisdiction over federal administrative authority by means of the prerogative writs and other extraordinary remedies (save *habeas corpus*) was, by section 18 of the Act, exclusively vested in the Trial Division of the Federal Court, and thereby taken away from the provincial courts. However, the Trial Division's jurisdiction could only be exercised if the Federal Court of Appeal had no jurisdiction, and the latter was given broad power under section 28 of the Act to review administrative decisions on the basis of any error of law, abuse of natural justice or capricious finding of fact. The effect was to substantially

reduce the role of the Trial Division in administrative law matters from what it might at first sight appear.

The existence of the *Federal Court Act* resulted in several benefits beyond effecting a cure to the jurisdictional problems we have referred to. There was a sharp increase in judicial review in areas of administration which in practice had not been previously subjected to the scrutiny of the courts. The Act also went some considerable way towards ensuring that cases are heard by judges who deal with administrative law problems on a regular basis and who are familiar with the federal administrative structure. These various reasons—the avoidance of jurisdictional problems between provincial courts and the consequent confusion at the administrative level, the extension of judicial review, and the need for a single court familiar with federal administrative law and structures—constitute in our view strong grounds for maintaining a federal court exclusively charged with judicial review over federal officials and other administrative authorities.

During the six years of its existence the Federal Court has played a useful and ever-widening role in the guidance of federal administrative tribunals. But in that time a number of problems regarding its jurisdiction have arisen which have led to increasing demands for amendment of its constituent statute, which are now under consideration by the government. Under these circumtances the Commission has thought it advisable to have prepared an in-depth Background Paper on the administrative jurisdiction of the court which should be published at about the same time as this Working Paper. This, we hope, will be helpful to all those who are concerned with the matter.

At one stage, it was our intention that this Background Paper would be our sole contribution to the debate on this issue, but since we have given considerable thought and study to the matter, we concluded that it might further assist in focussing the issues and ensure that certain considerations were not overlooked if we were to set forth preliminary views in a Working Paper. We have had some hesitation about taking this course at this time. In the first place, we have not yet come to precise conclusions on the role the courts should play in relation to administrative action. There are a number of areas where more research would be required or desirable. And we have not had the benefit of the wide range of consultation we normally seek. Our views must, therefore, be regarded as tentative.

Nonetheless, we have done considerable work in the area and feel it would be useful while the matter is being considered to express our tentative views on the various issues.

The major problems regarding the administrative law jurisdiction of the Federal Court may be classified as follows:

- problems respecting its interaction with the provincial superior courts;
- problems relating to the allocation of jurisdiction between the Trial Division and the Federal Court of Appeal;
- problems relating to the grounds of, and the means of redress available on judicial review;
- problems respecting the administrative action subject to judicial review;
- miscellaneous questions of lesser importance.

We will now examine these problems in turn.

II.

Interaction with Provincial Courts

There have been considerable complaints from many quarters respecting the interrelationship between the Federal Court and the provincial superior courts. Some have even called for a restoration of the situation before 1970 by returning to the provincial superior courts the power of review over federal administrative authorities. But what this probably reflects is an annoyance flowing from situations where, it seems to us, there are legitimate grounds for complaint. As we noted the case for a single federal court exercising judicial review over federal administrative authorities is, in our view, very strong. In addition to the reasons we have already given, the court has since its inception effectively carried a heavy load of administrative law cases that would have put a serious strain on the provincial superior courts.

Certain constitutional problems have also been raised. We do not propose to get involved in these to any extent. We are convinced that Parliament, under section 101 of the *British North America Act,* may establish a federal court to exercise exclusive judicial control over federal administrative authorities as an additional court for the administration of the laws of Canada. There may conceivably be some difficulty about the validity of any provision purporting to remove from the provincial courts the power of examining constitutional questions by means of the prerogative writs, as there may be about the validity of vesting criminal jurisdiction in the Federal Court. But these questions need not detain us. We doubt that the courts would interpret a broad general section (such as section 18 of the *Federal Court Act*) giving the Federal Court exclusive supervisory power over federal adminis-

trative authorities as intended to denude the provincial courts of their power of judicial review over constitutional questions, if indeed this exceeds federal constitutional capacity; rather, we think they would tend to interpret it as not being addressed to that issue. So far as criminal proceedings are concerned, the disposition of these issues we propose makes the question irrelevant.

One of the principal sources of complaint about the Federal Court relates to situations where, either at the trial or appeal level, the court exercises judicial review over the actions of persons who are judges of provincial superior courts. Although the Federal Court's powers of judicial review are confined to "federal boards, commissions or other tribunals" and provincial supreme, county and district court judges are expressly excluded (as being appointed under section 96 of the *British North America Act*), there are situations where these judges have been held to act not in their capacity as section 96 judges but as persons (*persona designata*) assigned to perform specific functions.

The foregoing can best be exemplified by the procedure in extradition cases. Under the *Extradition Act* provincial superior and county court judges are given jurisdiction to have a person whose extradition is sought by a foreign country apprehended and to determine at a hearing whether there is sufficient evidence to warrant his committal for surrender, the evidence required and the procedure to be followed being similar to that at a preliminary hearing for an offence committed in Canada. In short, it is an ordinary criminal matter involving an international element. Before 1971, virtually the only means of review of an extradition hearing was by way of *habeas corpus* before a provincial superior court judge. The Supreme Court of Canada has held, however, that a judge at an extradition hearing is not acting in his capacity as a section 96 judge, but is a *persona designata* and is, therefore, a "federal board, commission or other tribunal" whose actions are subject to review by the Federal Court, a final decision to commit or not to commit coming within the jurisdiction of the Court of Appeal, and interlocutory matters, such as remand and bail, coming within the jurisdiction of the Trial Division.

We think the complaints against review of extradition cases by the Federal Court are well founded. The review of a case heard by a judge experienced in criminal law by judges normally engaged in civil and administrative matters seems anomalous. The hearing of

the matter on *habeas corpus* by provincial superior court judges who regularly hear criminal cases (a procedure that has not been abolished) would seem to be the appropriate means of review. Interventions by the Federal Court in this area should be removed in view of the provincial superior courts' greater experience in the field. The major advantage served by review by the Federal Court would appear to be consistency, but if consistency is desired it can be obtained, as in other criminal matters, by appeals to the provincial courts of appeal, and thence with leave, to the Supreme Court of Canada. This would, however, require amending section 40 of the *Supreme Court Act,* which now prohibits appeals from *habeas corpus* to the Supreme Court in extradition matters.

What has been said of extradition applies equally to the surrender of persons to Commonwealth countries under the *Fugitive Offenders Act.* Indeed, we think that if there are any other criminal proceedings subject to review by the Federal Court, it should be removed, leaving it to the provincial superior courts, which deal with criminal matters on a daily basis. This does not apply, however, to matters arising before the Parole Board, where the same considerations for giving jurisdiction to the Federal Court exist as for other federal boards. But should Parliament implement the proposal in our Report on *Dispositions and Sentences* that provincial judges should, along with the proposed Sentence Supervision Board, have a measure of supervision of prisoners, this matter may have to be reconsidered.

But what of non-criminal matters? Some commentators argue that in no case should there be review by the Federal Court of a provincial superior court judge, even when the latter acts as a *persona designata.* With this broad statement we cannot agree. We think judicial review should be assigned to the court having the most competence in the subject matter. As regards federal matters, that will usually be the Federal Court. The same considerations would seem to apply to situations where provincial functionaries are acting as federal boards, commissions or tribunals. In some cases, the better course may be to remove the original jurisdiction from the provincial courts or the provincial functionary. For example, we have recommended this for federal expropriations in our Report on *Expropriation.* Where judicial review can more effectively be done by the provincial superior courts this can be expressly provided, but the general rule should be that the power of judicial review over

federal administrative authorities should be with the Federal Court. Furthermore, we favour the continuance of general provincial superior court jurisdiction over *habeas corpus.*

When the *Federal Court Act* came into force in 1971, the jurisdiction of the provincial superior courts in *habeas corpus* continued unabated. Because of the Federal Court's wide review jurisdiction, it is quite possible that both it and the provincial courts may have jurisdiction in respect of the same matter. We have already given reasons why we favour review of federal administrative law issues by a single federal court. Nonetheless, the approach taken with respect to *habeas corpus* seems to be justified. While duplication of jurisdiction is undesirable, it is even more undesirable to limit the access of an individual to the courts to test the legality of his detention. The liberty of the individual is at stake here. He should be given the opportunity to regain his freedom before the ordinary courts wherever he happens to be.

The ability of the provincial superior courts to examine into the legality of a person's detention may, however, possibly have been weakened inadvertently by the granting of exclusive *certiorari* jurisdiction to the Federal Court. In at least one province, that writ is often used in aid of *habeas corpus,* and it would seem that the exclusive grant to the Trial Division of *certiorari* jurisdiction in respect of matters arising before federal administrative authorities has deprived the provincial superior courts of that tool. However, if the suggestion we have made—that criminal proceedings be excluded from the application of the *Federal Court Act*—is adopted, the provincial superior courts would then be able to resume their use of *certiorari* in aid in criminal proceedings.

There are, however, some disadvantages to the retention by the provincial superior courts of *habeas corpus* jurisdiction in respect of matters coming before federal administrative authorities. For there may be situations where both they and the Federal Court have jurisdiction over the same subject matter, and conflicting interpretations of the statutory powers of an administrative authority may occur. For example, in extradition matters there would seem, since 1971, to be two separate routes of review (or several if one seeks relief at both levels of the Federal Court), and these are not mutually exclusive. A person can seek relief by way of *habeas corpus* or by an application under section 28 of the *Federal Court Act,* and

interlocutory relief may as well be obtained under section 18 of that Act. This particular problem would vanish if the suggestion we have previously made is adopted. But it could continue to arise in non-criminal matters, such as immigration.

Some minimization of this possibility might result if *habeas corpus* jurisdiction were also granted concurrently to the Trial Division of the Federal Court in matters arising before federal administrative authorities, so long as a person is limited to one application for the writ in the absence of new evidence, as is currently the case in the provincial superior courts. A stronger argument can be made for directing all appeals from the writ in matters arising before federal administrative authorities to the Federal Court of Appeal. For it is that court that has the primary obligation of maintaining consistency in the law regarding those authorities. On balance, however, we are hesitant to recommend either of these courses; the field of operation seems small, the provincial courts have wide experience in *habeas corpus* applications and the profession at large is more familiar with practice in the provincial courts. On matters involving the liberty of the subject, these considerations cannot be ignored.

We may thus summarize our views:

1.1. The exclusive jurisdiction of the Federal Court to exercise judicial review over federal boards, commissions and tribunals should be continued.

1.2. However, the jurisdiction of the Federal Court to exercise judicial review over procedures to surrender criminals to Commonwealth and foreign countries and probably over any other criminal proceedings arising before provincial courts should be removed and left to the usual means of review before the provincial superior courts.

1.3. Apart from criminal matters, the Federal Court should as a general rule continue to exercise judicial review over provincial court judges when acting *persona designata* as federal boards, commissions or tribunals. Exceptions may be made when the provincial superior court judges are, because of their specific experience, more appropriate to exercise review jurisdiction. At times the better course is to remove the original jurisdiction from the provincial court judges.

1.4. Similar considerations as in **1.3** apply to situations where a provincial functionary acts *persona designata* as a federal board, commission or tribunal.

1.5. *Habeas corpus* jurisdiction should remain exclusively in the provincial superior courts.

III.

Court of Appeal and Trial Division Jurisdiction

The Problems

As already mentioned, a first look at the *Federal Court Act* may give the impression that the Trial Division has very extensive powers of judicial review since section 18 gives it exclusive original jurisdiction to issue the prerogative writs (other than *habeas corpus*) and injunctions and to grant declaratory relief from federal boards, commissions or tribunals. However, sections 28 (1) and (3) make it abundantly clear that the Trial Division has no jurisdiction in cases where the Federal Court of Appeal has the power to review and set aside the decisions or orders of these authorities, and since the Federal Court's powers of review under section 28 are very broad and comprise much of what was once dealt with under the traditional remedies assigned to the Trial Division, the latter's jurisdiction is consequently narrower than would appear at first sight.

Section 28 (1) reads as follows:

> **28.** (1) Notwithstanding section 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal, upon the ground that the board, commission or tribunal
>
> (*a*) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
>
> (*b*) erred in law in making its decision or order, whether or not the error appears on the face of the record; or

(*c*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

So wide is this jurisdiction that there is some reason to suppose that the sole purpose of section 18 was to remove from the provincial superior courts the power of review of federal administrative authorities. However that may be, the section has not in practice been restricted to this purely negative effect. The Federal Court of Appeal has tended to limit the decisions or orders it may review to final decisions or orders except where a statute specifically provides for a preliminary decision. The Trial Division has, however, assumed jurisdiction to review preliminary or interlocutory matters by means of the traditional remedies.

Again, the provision in the opening words of section 28(1) making any "decision or order of an administrative nature not required by law to be made on a judicial or quasi-judicial basis" fall outside the jurisdiction of the Court of Appeal makes these decisions reviewable by the Trial Division to the extent that they fall under the methods of review set forth in section 18. This provision (which has given rise to all kinds of definitional problems) has the effect of imposing a further limitation on the Court of Appeal's jurisdiction. Under section 28(4) any federal board or other tribunal whose decisions may be reviewed under section 28 (1) may at any stage refer any question of law, jurisdiction or practice or procedure to the Court of Appeal, thereby perhaps avoiding the necessity of a subsequent review. This type of procedure, which should be most useful in saving time and money, does not exist at the Trial Division level and is accordingly not available at all in situations involving decisions or orders not subject to review under section 28(1).

Another matter worth noting is that certain types of relief can be given by the Trial Division, but not by the Federal Court of Appeal. All the latter can do is to set aside a decision or order, or refer it back for determination with appropriate directions. It cannot, for instance, compel an authority (as the Trial Division can by *mandamus*) to perform a legal duty, or prohibit an authority from taking certain action (as the Trial Division can by prohibition or injunction).

While the court has tried manfully to clarify the respective jurisdiction of the two divisions, the fact remains that after some six years' experience and much litigation, it is still difficult to determine

with precision what falls within the jurisdiction of the Federal Court of Appeal and what falls within that of the Trial Division. We realize that in practice much can and has been done to avoid this problem by the application of a rule of court under which the Chief Justice may assign a matter to the appropriate court, but this is hardly the best way to meet the problem. Moreover, no rule of court can do anything about the jurisdictional deficiencies, some of which we have noted and others we will refer to later in discussing grounds for review.

Compounding the jurisdictional problems is the fact that a number of specific appeals from certain administrative authorities to the Supreme Court and Exchequer Court were retained when the Federal Court succeeded to the latter's jurisdiction in 1970. Where the grounds of appeal do not fully occupy the area covered by sections 18 and 28 of the *Federal Court Act,* redress may also be available under these sections. This, too, can raise nice jurisdictional problems, although the practice of the court has been to provide some solution by permitting review applications and appeals to be heard together.

Apart from the difficulty of determining which level of the Federal Court has jurisdiction, another important fact has struck us: that both the Court of Appeal and the Trial Division have been assigned some inappropriate work that can be extremely burdensome. The Court of Appeal, for example, hears in first instance a large number of immigration cases that are quite routine. The need of assembling three members of an appeal court to hear such matters in various parts of Canada is, we think, impossible to demonstrate. For their part, members of the Trial Division have to hear a large number of unemployment insurance cases (280, for instance, in 1975), and these too require judges travelling all over Canada.

In a general way, we sense that the Court of Appeal may have too much to do. Our Background Paper describes the court's administrative law docket as "in many senses staggering". To the court's great credit this has not resulted in delay. Indeed, from its establishment the court has been noted for the efficiency and expeditiousness with which it has performed its work. Nor, although like other courts it has been the subject of adverse comment in some areas, has there been any general criticism that the quality of justice it administers is defective.

Nonetheless we consider it undesirable for the Court of Appeal to be overburdened. The court must be able to function under conditions that permit it to give wise and consistent guidance regarding the just and fair operation of administrative tribunals. To do this it must have time for reflection; it must function collegially; and it must have the time to write judgments that the Trial Division and the tribunals can look to for guidance that goes well beyond the particular facts of the case.

We do not think existing conditions are favourable to these ends. The volume of work is not conducive to reflection, and much of it does not raise the general or important issues that should form the staple material of a court of appeal. As well, the volume of work has sometimes resulted in judgments that our Background Paper describes as "quite cryptic", and these at times involve issues where reasoned guidance from the court would be most welcome. Nor does it make for collegiality in the making of decisions. The work of the court involves considerable travelling and often requires that one, and sometimes two deputy judges drawn from outside the membership of the court, sit. This not unnaturally leads to a measure of inconsistency in approach.

Some Possible Solutions

Various solutions to these problems are possible. At a minimum, unemployment insurance appeals should be taken away from the judges of the Trial Division and assigned to another forum (such as the one proposed in our Study Paper, *Unemployment Insurance Benefits*). So too the immigration cases should be transferred from the Court of Appeal to the Trial Division. Since these involve the right of a person to remain in Canada, they should certainly be reviewable by a court on grounds of illegality and fair procedure, but the bulk of them is routine in character and we question whether a hearing by more than one judge is required. If a case is important or difficult enough, it can be appealed to the Court of Appeal. The same result might be achieved by leaving these matters with the Court of Appeal but permitting review only with leave of a judge of that court. As will be seen, however, we generally prefer review to initiate in the Trial Division.

But these purely mechanical transfers of jurisdiction would do nothing to solve the problems of conflict of jurisdiction. One possible solution is to give the Court of Appeal the power to review both final and interlocutory decisions of the major administrative agencies (which could be listed in a schedule to the *Federal Court Act*). In this way, a clearer and better balance could be achieved in the work of the two levels of the court. We do not, however, favour this solution. Assuming an adequate determination can be made of what are the more important agencies, it by no means follows that a question raised before a lesser body is any less important to the individual concerned, or as a matter of law, than one raised before a major body. Moreover, such an arrangement would have a tendency to bifurcate federal administrative law into two branches, even though appeals would help to achieve consistency.

The best solution, we think, is that judicial review of federal administrative action should originate in the Trial Division of the Federal Court, from which there would be an appeal, with leave, to the Court of Appeal. The desirability of a single route for judicial review seems self-evident. As we mentioned earlier there seems to be ground for thinking that it was originally thought there would only be one route for review, though at the Court of Appeal level.

There seems to us to be sound reason why federal judicial review should originate in the Trial Division, however. An obvious one is that many of the matters requiring review can quite effectively and economically be heard and disposed of by a single judge. We might again refer to the many immigration matters that raise no difficult issues, but on which three judges of the Court of Appeal must now sit in various parts of Canada. This transfer of jurisdiction should not unduly burden the Trial Division, for as we suggested, its members could be relieved of their burdensome duties as unemployment insurance umpires. If the work load does increase, it is much easier to provide for the extra burden by appointing new judges since cases at this level are heard by a single judge. We rather think, too, that placing judicial review over both interlocutory and final decisions in the same court has obvious advantages. The court can more clearly determine whether to deal with an interlocutory matter or wait for it to be brought up following a final decision.

It may be argued that it is incongruous for a single judge to sit in review of a tribunal that may have several members, and this we understand played a part in originally vesting review powers in the

Court of Appeal. We cannot accept this argument. For one thing some of the major tribunals are not manned by lawyers. And even when they are, the argument misses the point. Judicial review does not involve reviewing the merits of a decision. What it reviews are questions of legality and fair procedure, questions about which courts are expert and which they are in a position to review impartially. Tribunals, as we would expect, do try to act legally and fairly and try to develop adequate procedures, but their attention is not as clearly focussed on these issues and they are themselves affected by the decision. Tribunals are rightly much concerned with the efficient operation of their work but that perspective may occasionally prevent them from perceiving the need for fairer procedures. It is the disinterested position of the judge and his expert knowledge of law and fair procedure that warrants judicial review, not the number of judges. Otherwise one would require ten judges to review decisions of nine-men tribunals.

We recognize, however, that there are cases that are obviously of sufficient importance, either in their own right or because of the legal issues they raise, to warrant a hearing by a three-man court and would in any event probably be appealed. It seems unproductive in such cases to require the expense and delay of an original hearing before a judge of the Trial Division and then an appeal. Accordingly we would propose that the judge before whom a matter arises may in his discretion either on his own motion or at the request of either party, transfer the case for immediate determination by the Court of Appeal. A similar and overriding discretion might also be vested in the Chief Justice of the court, but this could give rise to procedural difficulties that are perhaps best avoided. However, the Court of Appeal should have power to establish guidelines for the exercise of this discretion. We do not have in mind here legally binding rules (which could conceivably give rise to procedural difficulties) but mere directives to assist a judge in exercising his discretion in accordance with the general policies of the court. The guidelines could also be used as a means of adjusting case loads between the two divisions, a device that could prove most useful at the early stages if the restructuring of the court we propose is adopted. Another technique is to statutorily vest discretion in the Trial judge to remove a case to the Court of Appeal when he deems a case or the legal issues it raises warrant this course. This technique, however, is not quite as flexible and experience in some provinces indicates that

similar provisions are not often used. Whichever method might be adopted, we would hope it would be used for its obvious purpose of expediting litigation.

If the Trial Division is to function well in administrative law matters, it is important that certain judges be specifically assigned to deal with them so that they can develop expert knowledge in the field and of the federal administrative process generally. We voice no opinion on whether there should be a specific division charged solely with this task, or whether any judge of the Trial Division should work solely in that area. That is a matter of machinery. The important thing is that the cases go to judges who have or are given an opportunity to develop the necessary skills and experience.

Our preference for one route for judicial review does not mean that we disapprove of the procedure under section 28 (4) that allows an administrative authority to refer questions of law, jurisdiction, practice or procedure to the Federal Court at any stage of its proceedings. As we stated this is a useful procedure, which should be extended to all questions that may form the subject of judicial review. Consistently with the general scheme we have proposed, however, this jurisdiction should initiate in the Trial Division.

Our preference for a single route for judicial review also militates against the maintenance of the special appeals from particular tribunals, at least where the grounds of appeal are of a type normally examined in ordinary judicial review proceedings, i.e. questions of law and jurisdiction. Our present view is that these special appeals should, in general, be repealed and the administrative authorities from which these appeals may be taken should be made subject to the ordinary procedures for judicial review. In some cases, however, there are valid reasons for retaining the special appeals. This is so, for example, of the "appeal", or rather trial *de novo,* from the Tax Review Board. In such cases, we think the appeals should be general and include matters normally subject to judicial review. The Commission is currently undertaking a study of these appeals from which we hope to assess their value. In this we are following the admonition of the Chief Justice of the Federal Court who has stated that such a study should be undertaken with a view to determining whether there should be an unrestricted right of appeal, or no appeal at all, in which case the only remedy would be an application for judicial review.

Another advantage to the single route for judicial review we propose is that it could contribute to creating the conditions necessary for the Court of Appeal to have adequate opportunity for reflection, to function collegially, and thereby be in a position to write judgments for the consistent guidance of the Trial Division and the administrative authorities. In our view, appeals to the Court of Appeal should always be by leave, either by the Court of Appeal or the Trial Division, to ensure that only important questions go to the Court of Appeal. Since the Court of Appeal, as experts in federal administrative law, should be given ample opportunity to develop its own jurisdiction, appeals to the Supreme Court of Canada should continue as in other cases to be by leave, and be limited to cases that the Court of Appeal considers ought to be submitted to the Supreme Court, or that the Supreme Court considers of public importance, or as raising important issues of law or mixed facts and law, or is for any other reason of such nature and significance as to warrant decisions by it.

In summary, our tentative views on the jurisdictional questions discussed in this chapter are as follows:

2.1. Our preferred general solution is that judicial review of all federal administrative authorities should originate in the Trial Division.

2.2. Trial Division judges should, however, have the discretion to transfer to the Court of Appeal cases that are important in their own right or raise important legal issues. Consideration should also be given to empowering the Court of Appeal to establish guidelines for the exercise of this discretion.

2.3. Specific judges of the Trial Division should be assigned to hear cases involving judicial review of administrative authorities to ensure that the cases are heard by judges familiar with administrative law and the federal administrative structure.

2.4. Our present orientation is that the special appeals now existing from some federal authorities should be repealed whenever they involve questions ordinarily raised on judicial review; special appeals involving review on the merits should be general appeals including questions normally subject to judicial review, so that in cases where a special right of appeal exists, there will be no necessity for relying on the general provisions

for judicial review. (The Commission is currently having a study undertaken of these special appeals).

2.5. Federal administrative authorities should have a right (along the lines of section 28(4) of the *Federal Court Act*) to refer any question of law, jurisdiction, practice or procedure to the Trial Division.

2.6 Appeals from the Trial Division to the Court of Appeal should be by leave of the Trial Division or the Court of Appeal to ensure that the work of the Court of Appeal consists of cases of great importance in their own right or raise important questions of law.

2.7. Appeals from the Federal Court of Appeal to the Supreme Court of Canada should continue as in other cases to be with leave. To permit the Court of Appeal to develop its own jurisprudence, leave should as at present be only when that court considers it appropriate or the Supreme Court of Canada deems a question of sufficient importance or is otherwise of such a nature and importance as to warrant a decision by it.

Whether the general scheme above described is accepted or not, the following minimum changes should be made:

2.8. Members of the Trial Division should no longer act as employment insurance umpires; this task should be assigned to a specialized administrative tribunal.

2.9. The immigration appeals should be transferred to the Trial Division with the right to appeal as in other cases to the Court of Appeal.

IV.

Grounds and Procedures for Review

In the preceding chapter, we recommended a consolidation of the judicial review provisions in the Federal Court with initial jurisdiction in the Trial Division. This inevitably involves a consolidation of the grounds of review as well. But this is no easy task. One cannot simply add the provisions of sections 18 and 28; the first is written in terms of remedies, the other articulates the grounds and the modes of relief; and the provisions overlap.

One possible approach is to continue to have judicial review of final decisions on grounds of a kind set forth in section 28, leaving preliminary or interlocutory matters to be dealt with by means of the prerogative writs and other remedies now set forth in section 18. This in a very general way is the existing and problematic situation today. But this approach is at best artificial and would require considerable tinkering to achieve reasonably satisfactory results. The section 28 grounds, as we saw, leave a number of gaps, and the type of relief available to the court is insufficient; mandatory and prohibitory orders must be obtained by resorting to the prerogative writs and the other extraordinary remedies now listed in section 18. And the prerogative writs, as many commentators have noted, are full of mystery and deficiencies and should be reformed.

Continued reliance on the prerogative writs and other extraordinary remedies, either alone or as an important part of a statutory scheme of judicial review would, in our view, be a retrograde step. Admittedly, the courts have over the centuries performed yeoman service in using "extraordinary remedies" to

develop principles for reviewing administrative action that is illegal or unfair. But each of these remedies has its own peculiar limits and technicalities. One must choose the proper remedy, and this can be very difficult; few lawyers indeed can describe with any certainty the precise limits of each remedy. Moreover, a remedy may cover the appropriate ground, but not afford the relief required. Or the reverse may be true.

These difficultires are not peculiar to Canada. A similar situation prevails in Great Britain, Australia, the United States and other common law countries. We have had the benefit of examining a number of studies and proposals for reform made in those countries as well as in Canada. A statement from the Victoria Statute Law Revision Committee's 1968 Report on Appeals from Administrative Decisions aptly sums up the problem:

> There is general agreement that the system surrounding the writs is immersed in technical procedural snares which delay, and in some instances prevent, proper review by the courts. It is not uncommon that, after lengthy legal argument, the court will hold that a particular writ is not available, and because the boundaries of each remedy are undefined (and perhaps undefinable) there are many cases which never proceed further. The historical restriction on the issue of certiorari and prohibition to bodies held to be acting in a judicial capacity may involve extensive argument in determining whether a particular body does in fact have a judicial function. Time may be consumed considering some doubt as to whether certain defects in the exercise of discretionary powers go to jurisdiction, and hence are amenable to certiorari. In terms of the individual seeking a just solution to his problem, the ramifications of judicial review by these methods are at best frustrating. The salient feature of interest to him in these proceedings—the legality of the administrative act or decision at issue—appears to be subordinate to seemingly endless legal argument as to the propriety of the method of review employed.

The highly respected American authority on administrative law, K. C. Davis, says much the same thing in more colourful language:

> An imaginary system cunningly planned for the evil purpose of thwarting justice and maximising fruitless litigation would copy the major features of the extraordinary remedies. For the purpose of creating treacherous procedural snares and preventing or delaying the decision of cases on their merits, such a scheme would insist upon a plurality of remedies, no remedy would lie when another is available, the lines between remedies would be complex and shifting, the principal concepts confusing the boundaries of each remedy would be undefined and undefinable, judicial opinions would be filled with misleading generalities and courts would studiously avoid discussing or even mentioning the lack of practical reasons behind the complexities of the system. . . The cure is easy. Establish a single, simple form of proceeding for all review of administrative action.

In the words of another eminent authority, the late Professor S. A. de Smith of Great Britain: "This state of affairs bears a striking resemblance to that which obtained when English civil procedure was still bedevilled by the old forms of action."

A partial solution to this problem is the combining of all the remedies into one. Only one application to the court need then be made; a case is not lost because the wrong remedy is chosen. This approach is a clear improvement and should certainly be adopted if the prerogative writs are retained for any purpose. It has been adopted in Ontario and British Columbia and recommended by the English Law Commission (although the latter was restricted by narrow terms of reference). But this solution has clear drawbacks. First of all, it in no way diminishes the internal deficiencies and mysteries of the prerogative writs. It merely improves procedure; it effects no reform in the substantive law. And it continues to have a second important defect of making the law difficult to understand. We have frequently repeated our view that law must as much as possible be made accessible to all. Here it is difficult for the lawyer to find or understand, let alone the layman.

At the federal level, a full reinstatement of the prerogative remedies would obviously be a retrograde step. Section 28 was a clear advance over the situation in other common law countries. Though deficient in some respects, it went some considerable way towards setting forth the grounds of review in an understandable form. What is needed now is to build upon the approach begun by section 28 by adding the grounds and forms of relief available by means of the prerogative writs and the other extraordinary remedies. It is not enough to have a single application for judicial review. The grounds for review should be expressly articulated and the court should be empowered to grant any form of relief now available as may be appropriate to the situation before it. With Davis we think that what is needed is "a single, simple form of proceeding for all review of administrative action", and one, moreover, that articulates the grounds of review and the forms of relief.

We have had the benefit of studying the work of the Commonwealth Administrative Review Committee established by the Attorney-General of Australia in 1968 under Mr. Justice J. R. Kerr to study the review of administrative action and the subsequent report of the Ellicott Committee established to assess the Kerr Committee's findings. After examining the experience in England, the United

States, New Zealand and France, as well as that in Australia, the Kerr Committee suggested the following grounds of judicial review which seem to be appropriate for the Federal Court:

- denial of natural justice
- failure to observe prescribed procedures
- *ultra vires* action
- error in law
- fraud
- failure to reach a decision where there is a duty to do so, and
- unreasonable delay in reaching a decision.

These grounds are largely distilled from the extraordinary remedies. That relating to unreasonable delay, though possibly already implicit, is probably new. In any event we find it desirable. The Ellicott Committee, while agreeing with these recommendations, broadened the grounds of relief somewhat at the suggestion of Professor H. W. R. Wade. First, they added a new ground: lack of evidence to support a decision. This, we think, is similar to section 28 (1) (*c*) of the *Federal Court Act*. Secondly, the Ellicott Committee thought the grounds should be open-ended to some extent to permit the kind of judicial development now possible under the traditional remedies. This, they thought, might be achieved by a provision empowering the court to grant relief generally where it was of the opinion that an administrative authority was acting contrary to law, and adding that without limiting the generality of the foregoing, the court could give relief under the grounds already specified. Here again we think there is merit in these recommendations and we understand that they will be implemented in Australia. In Canada, it may be preferable to build upon the wording of section 28. The important thing, however, is to have a single remedy articulating the various grounds of review.

To give relief on these grounds the court should, as we noted, be armed with every type of relief possible under all the existing remedies. This was also the view of the Australian Committees. The Ellicott Committee thus expressed it:

> That the Court should be able to grant relief by way of...
> - an order quashing or setting aside a decision (which could include a report or recommendation)
> - an order restraining proceedings without jurisdiction or any breach of natural justice or any breach of procedural requirements prescribed by statute or regulation

- an order compelling the exercise of jurisdiction or observance of natural justice or statutory or regulatory procedures
- an order referring the matter back for further consideration
- a mandatory order compelling action unlawfully withheld or unreasonably delayed
- an order declaratory of the rights of the parties
- such other order as may be necessary to do justice betwen the parties.

Certain matters require clarification here. In view of the cases holding that the term "decision or order" in section 28 of the *Federal Court Act* is generally limited to final decisions, it should be made clear that review is available not only from final decisions, but from preliminary or interlocutory decisions as well. And it must also be evident that review extends, as do the traditional remedies, not solely to decisions in the strict sense but to situations where administrative action is unlawful or there is a failure to act where there is a duty to do so.

In our Working Paper on *Commissions of Inquiry,* we noted that we were favourably disposed towards the judicial control of investigatory commissions to ensure that they complied with the demands of basic fairness. As the last quotation indicates, the Australian Committees also favoured judicial review of certain reports and recommendations. Reports of Commissions of Inquiry and many recommendations by committees set up to look into particular charges have a good chance of being accepted, and this may be the most appropriate time to assess the fairness of procedures on which the ultimate decision is based. As the Kerr Committee put it, these reports and recommendations "often are, in effect, preliminary decisions" and for that reason "there should be, on grounds of fairness, a possibility of review in appropriate cases at the recommending stage". We realize that it may be difficult to define with precision the situations that should be open to review, but we think that if the courts were given the power to exercise judicial review over recommendations and reports not based purely on policy grounds that have a good chance of being followed by the ultimate decision-maker, they can be trusted to exercise it with wisdom and restraint. In fact the English courts have begun to develop the common law along these lines. But legislative intervention is almost certainly necessary to achieve the same result in Canada. We suggest that the *Federal Court Act* should be amended accordingly.

Finally, should an application for review be available as of right, or should it be only with leave of the court? We have come to the conclusion that the question whether or not relief should be granted should be handled much in the same way as applications for the prerogative writs now are. The court should, in our view, be empowered to dismiss an application for judicial review summarily at any time, this power to be used in accordance with judicial discretion, for example, where the grounds are trivial or non-existent, an order would be futile, the proceedings are vexatious or would cause delay, or in the case of an interlocutory matter, the issues could more conveniently be dealt with following a final decision of the tribunal. We think the court would, in the exercise of its discretion, make the appropriate distinction between interlocutory and final decisions. But if it is desired further to strengthen the court's power to resist applications for review of interlocutory matters, provision could be made that applications for review before a final decision would be subject to leave of the court.

In summary, our tentative views on grounds of judicial review and the modes of relief are as follows:

3.1. Judicial review should be initiated by a single application for review, whatever form of relief may be desired.

3.2. The grounds of review and the forms of relief should be expressly articulated in legislation.

3.3. The court should be enabled to review federal administrative authorities for action contrary to law, including without limiting the generality of the foregoing:

- denial of natural justice
- failure to observe prescribed procedures
- *ultra vires* action
- error in law
- fraud
- failure to reach a decision or to take action where there is a duty to do so
- unreasonable delay in reaching a decision or performing a duty
- lack of evidence to support a decision.

3.4. The court should be able to grant relief by way of

- an order quashing or setting aside a decision (which should include a report or recommendation)

- an order restraining proceedings without jurisdiction or any breach of natural justice or any breach of procedural requirements prescribed by statute or regulation
- an order compelling the exercise of jurisdiction or observance of natural justice or statutory or regulatory procedures
- an order referring the matter back for further consideration
- a mandatory order compelling action unlawfully withheld or unreasonably delayed
- an order declaratory of the rights of the parties
- such other order as may be necessary to do justice between the parties.

3.5. A decision should include a failure to make a decision. It should also include reports and recommendations that are likely to be acted upon.

3.6. The court should in the exercise of a judicial discretion have the power to dismiss an application for review at any time. This judicial discretion could be exercised when, for example, proceedings are vexatious, the grounds are trivial or non-existent, an order would be futile, or in the case of interlocutory matters, the issues could be more conveniently dealt with following a final decision of the tribunal.

V.

Administrative Action Subject to Judicial Review

Who Should Be Subject to Review?

What action should be subject to judicial review? What officials and bodies and what kinds of decisions should be reviewable? With the vast and increasing number of decisions delegated to individuals and bodies at all levels of government, it seems imperative that the scope of the court's power to review these decisions be not unnecessarily restricted, and that it keep pace with these developments. The English courts have sensed this need and have moved into new areas of administrative action, including ostensibly discretionary decisions by Ministers, untrammelled by the traditional judicial, quasi-judicial, and administrative classification of functions in order that basic and flexible standards of fairness are met.

The *Federal Court Act*'s language invites a similar approach. First of all, the definition of "boards, commissions and tribunals" made subject to review is expressed in the broadest of terms and includes all statutory authorities. Here the courts have generally responded to the invitation. The Federal Court, in one case, for example, has reviewed the decision of a Minister on the ground of procedural unfairness where the words and administrative scheme of the particular statute invited this construction. But the Supreme Court of Canada, in a rather similar case, has declined to do so. In one area, extradition, the courts have even gone too far in our view, but that, as we previously noted, is a special situation. Generally, we

think a broad approach is essential and that review should continue to extend to all statutory authorities, whether they are Ministers, officials, administrative boards, commissions or tribunals. Although there will inevitably continue to be a penumbra of uncertainty, we also sympathize with the courts' exclusion from review of decisions of Crown corporations created by the federal Parliament.

Under section 28(6) of the *Federal Court Act,* certain matters are excluded from review under section 28, namely decisions or orders of the Governor in Council (Cabinet), Treasury Board, a superior court or the Pension Appeals Board, and proceedings for service offences under the *National Defence Act.* However, these may be subject to review under section 18 or otherwise. Thus if the Cabinet acts beyond its power, a person affected by that action may seek a declaratory order from the Federal Court. If a single route for judicial review is adopted, provision will have to be made to retain this form of review. Cabinet action must continue to be subject to judicial review for legality, but the courts do not appear to be the appropriate forum to look into whether the Cabinet is acting according to natural justice. This is best left to the political process. The same considerations apply to the Treasury Board. The other exceptions in section 28(6) are of a different nature. Superior courts are not subject to judicial review; corrective functions are exercised by means of appeals. The Commission has not examined the underlying policies governing the remaining exceptions. We would simply say that exceptions from judicial review should be kept to a minimum, and the opportunity afforded by the reopening of the Act should be utilized to consider whether these exceptions continue to be justified.

We have mentioned the use of declaratory relief as a means of obtaining judicial review of Cabinet action. Declaratory orders have traditionally been the means for obtaining review of Crown action, and since they are invariably respected, they generally constitute an adequate as well as an appropriate remedy, and should be retained. We do not intend here to enter further into the questions surrounding the nature of the citizen's relief against the Crown. That is a separate and larger subject which we have not examined. But we perceive a limitation to relief by declaratory order that could easily be corrected. A declaratory order may not be adequate where a

person's rights may be detrimentally affected before they can be fully determined by the court. Accordingly, we see considerable merit in the English Law Commission's recommendation that interim injunctions might usefully be applied to the Crown.

What Decisions Should Be Subject to Review?

Review for illegality has never been restricted by the nature of the decision. For many years, however, the courts restricted the scope of review on grounds of fairness by holding that the rules of natural justice applied only to decisions that they were willing to categorize as "judicial" or "quasi-judicial"; they were unwilling to enter into the question of fairness or otherwise of "administrative" decisions. Judicial interpretation of the opening words of section 28(1) has now extended the area of non-intervention by the Federal Court of Appeal. Under this interpretation, the court has no jurisdiction over any "administrative" decision, whether or not it involves questions of natural justice.

The distinction between "judicial" and "administrative" decisions is, of course, notoriously unclear. Whether a decision is held to be judicial or administrative often depends on inarticulated criteria, which make it difficult to say in what class a decision will fall. On the one hand, this can permit judges considerable discretion about what they will review; on the other hand, it may lead to unwise decisions based on reasoning in which the governing considerations may not be apparent. Cases decided on such broad categories do not provide real guidance and cannot easily be subjected to critical appraisal.

We do not doubt that there are good reasons for not having certain decisions reviewed by the courts, and that there are valid criteria to support the categorization of many decisions as "administrative". Considerations of efficiency, security, confidentiality, as well as the inability of courts to cope adequately with unstructured processes, come to mind. But we think it would be more helpful and promote consistency in judicial decisions if these considerations were openly expressed and weighed against the obvious desirability that governmental powers exercised under law should conform and should be seen to conform with at least minimum standards of

fairness, a minimum that itself varies with the circumstances. Inarticulate legal policy does not provide much of a guide for future decisions. It also encourages a type of judicial discretion based on the ideosyncracies of individual judges—ideosyncracies that cannot be tempered by rational arguments of other judges or commentators. When this occurs in the higher courts, it can freeze the law in an uncomfortable mold for years and make it extremely difficult to reform.

Our first objection to the judicial/administrative dichotomy, therefore, is that it reduces the rational element in law. We are also concerned that it tends to delay developments required by changing conditions. As we noted already, it is essential that delegated powers of government, whose number is increasing daily, be open to scrutiny. Here again, the English courts have begun to meet this challenge by ignoring the judicial/administrative classification and exercising their review functions to ensure fair procedures even in areas that can clearly be categorized as administrative.

There appeared to be an invitation in section 28 of the *Federal Court Act* to follow a similar course. The section is not in terms limited to judicial and quasi-judicial decisions, but includes all decisions, whether administrative or judicial, except certain administrative decisions—those not required by law to be made on a judicial or quasi-judicial basis. This apparent invitation to extend the ambit of judicial review appears to have been accepted in one case, but the possibility of continuing along this line has since been authoritatively scotched. The courts have been particularly restrictive in dealing with cases involving parole and penitentiary matters. In this context, the Supreme Court of Canada has recently gone further in narrowing the area of judicial review by holding that a decision under rules made pursuant to a statute is not subject to judicial review. We are not told whether this reasoning would apply in other contexts.

Reform in this area is difficult by legislative means. So much depends on the context in which a case arises. Moreover, it is often difficult to determine the basis on which courts have acted when the real reasons are inarticulated and, therefore, unknowable. Reformulation of the law could best be shaped by judicial policy, as has happened in England, but there is little evidence that Canadian courts are likely to take similar initiatives. It is possible that the

courts might take advantage of the fact that no specific reference to administrative and judicial decisions is made, in the type of legislation we propose, to extend the ambit of natural justice, but given recent judicial pronouncements, that seems doubtful.

One possible way of moving the courts away from making decisions on the basis of inarticulate reasons expressed in terms of the judicial/administrative dichotomy would be to enact a provision requiring, or possibly simply empowering, the courts to review any decision, whether judicial, quasi-judicial or administrative, for conformity with the rules of natural justice unless the public interest that decisions should conform to these rules is outweighed by another public interest, such as efficiency in government, national security, and confidentiality. This would force the courts to rely on express criteria, among which some of the more obvious are mentioned, but would leave it open to them to articulate other interests. This could extend the scope of judicial review without compelling the courts to hear cases that should not come before them. There is no reason to think the tradition of judicial restraint would cease, but the discretion now exercised under the labels of "administrative" and "judicial" would have to be justified on the basis of practical reasons in particular cases. This is in conformity with our objectives. As we have said earlier, we do not believe all governmental decisions should be subject to judicial review. There is clearly a need for restraint. But we think judicial review should not be artificially restricted to prevent review where there is manifest unfairness.

Under the proposed provision, a decision to review or not to review would be appealable and useful precedents built for the future. And if Parliament disagreed with judicial policy, it could introduce reforms to deal with specific problems. It would not have to cope with vague and general categories like "judicial" and "administrative" and the broad range of inarticulate criteria they conceal.

We may thus summarize our tentative views on the administration of judicial review:

> **4.1.** Judicial review, whether for illegality or unfair procedure, should continue to extend to all federal statutory authorities, whether they be Ministers, government officials or administrative bodies.

4.2. The Cabinet should continue to be subject to review for illegality, but not for unfairness. Relief against the Crown should continue to be by a declaration of rights, although consideration should be given to extending the interim injunction to the Crown. A similar régime would also seem appropriate for the Treasury Board. The other exceptions in section 28(6) of the *Federal Court Act* should be reconsidered to determine whether they continue to be necessary.

4.3. Future legislation providing for judicial review should avoid express use of the judicial/administrative classification of statutory powers to encourage the courts to avoid the tortuous rigours of this classification. Consideration should be given to legislation requiring or empowering the court to review administrative, as well as judicial and quasi-judicial, decisions for conformity with natural justice unless the public interest that decisions conform with natural justice is outweighed by another public interest, such as efficiency in government, national security, confidentiality, etc.

VI.

Miscellaneous

There remains a number of matters on which we will briefly set forth our views:

Privative clauses: Since we do not believe judicial review should be arbitrarily restricted, we think the new review provisions of the *Federal Court Act* should (like section 28 but unlike section 18) have effect notwithstanding any other statute.

Reasons for Decisions: The effectiveness, indeed the possibility, of review depends to a very great extent on the reasons for decisions given by an administrative authority. Ideally, persons aggrieved by decisions should be entitled to obtain reasons. And increasingly, either by legislative requirement or administrative practice, reasons are given. At times, however, reasons are not given or are inadequate, perhaps because of administrative burdens, such as the fear of revealing confidential information or sources. It is difficult to consider adequate legislative provisions relating to the giving of reasons in the absence of policies on uniform administrative procedures, privacy and freedom of information. Until decisions are taken on these matters, we would encourage the various administrative authorities to give candid reasons for decisions, indicating at least the general nature of information relied upon, and withholding information only where absolutely necessary.

Standing: Section 28 gives standing to "any party directly affected". The Background Paper we have commissioned indicates that this is narrower than the common law rule. The common law rule appears to give standing to the parties and persons aggrieved, and gives a discretion to the court

to give standing to any person it feels may have a legitimate interest. We think new legislation for judicial review should expressly provide for standing on the wider grounds now accorded by the common law.

Stay of Proceedings: An application for judicial review should not be permitted to delay proceedings. The proceedings before the administrative authority should not automatically stop but should continue unless stayed by that authority or the court. The proposed power of the court to stay proceedings is new, but seems to us to be desirable. There may be situations where the court's decision could be overtaken by events or a person's rights might be seriously affected by a continuation of proceedings. The power should, however, be sparingly used.

Time to Apply for Application and to Proceed: As a further measure to ensure administrative efficiency, the time for applying for, and proceeding with, applications for judicial review should not be overly long, so that administrative proceedings are not unnecessarily delayed. The power of the court to extend the time should be retained to allow for difficulties that may occur.

Damages: Consideration might be given to permitting the court to join an action for damages against the Crown or the administrative authority where such an action might be brought under another section of the Act, if all the facts relevant to the issue are before the court on an application for judicial review.

VII.

Conclusion

In a society committed to government under law, the role of the courts as a check on illegal or arbitrary action is crucial. Upon them falls the responsibility of reviewing the actions of state organs to ensure that they do not stray beyond the limits of the law. Nor are the courts restricted to the mere letter of the law. Under the rubric of natural justice, they also review state action from the standpoint of fundamental fairness. This role is vital to the political organization of our society. Otherwise it would be government that would determine what is and what is not within the limits of the law. And state organs would determine what is or what is not fair in executing the law. It is, therefore, of critical importance that the machinery of judicial review of state action—which at the federal level is the Federal Court—be efficient and effective.

The legal and institutional framework within which judicial review occurs must also be simple and accessible. The existing divided jurisdiction between the Trial Division and the Court of Appeal of the Federal Court does not meet these objectives. It has resulted in excessive complexity, uncertainty, and workloads that prevent the Court of Appeal from providing the guidance in its judgments that federal administrative law now requires if it is to develop properly. A single route of review is, in our view, the best way to meet these problems.

For similar reasons we also think it is time to build on the approach of section 28 of the *Federal Court Act* and state all the grounds for review, in an open-ended manner. This would avoid the procedural complexities and technical limitations of the prerogative writs. It responds to the need for clarity and accessibility of law.

We have also made a number of suggestions to bring within the ambit of judicial review certain matters that we think should be

subject to the scrutiny of the courts. In particular, we have made an attempt at finding some cure for the artificial restrictions on judicial review for fairness that can result from the categorization of functions as "judicial" or "administrative". These may sound like technical questions, but they far transcend the bounds of technicality. They have to do with the proper balance between the government and the courts.

As we have intimated, we see the role of the courts in reviewing government action as essentially a limited one. Political responsibility for decisions on policy should not be subjected to judicial review at all so long as these remain unstructured by law. Nor must the courts frustrate administration and cripple their own effectiveness by excessive interventions. But we think it essential that the courts have the discretion to decide when and what to review, and that they must justify their decisions to review or not to review by stated reasons. Merely to describe administrative action as "administrative" in nature is hardly an adequate justification for not intervening when arbitrary administrative action may seriously affect individuals.

There are, of course, valid reasons for the courts to exercise restraint in reviewing administrative action. Government efficiency, the adequacy of consideration within the administration (particularly when large numbers of administrative decisions are involved), national security (notably in times of war)—all these considerations and others weigh against an excessively activist role by the courts. But these reasons can be stated. Too often under existing law, reasons are replaced by a judicial search for quasi-judicial elements or tags, often motivated by a preferred solution. This is hardly an adequate rationalization of judicial review for people who seek a system of judicial review that is open, clear and understandable. The effectiveness of any system of judicial review, whether broad or narrow, must ultimately lie in the hands of the judiciary if the checks and balances of our governmental system are to operate effectively. But no area of administration should be automatically exempt, and the courts now require legislative prodding to ensure this. We confess, however, that the extent and method of effecting this poses difficult problems.

We would make one further point. Considerations of effectiveness and clarity are the basis for our view that judicial review of federal administrative action should continue in the Federal Court.

Specialization in administrative law and a deep understanding of the federal administrative process are required for the further development of administrative law at the federal level. But the jurisdictional net was cast too broadly to encompass criminal proceedings such as extradition, which originate before the provincial superior courts. This resulted in dual supervisory jurisdiction and caused some irritation between the courts and on the federal-provincial level. Happily the demands of effectiveness and the cure for this tenseness coincide. What is required is to restore exclusive jurisdiction in these matters to the provincial superior courts which have developed the skills and experience in criminal proceedings.

The proposals we have made in this Working Paper involve problems of great difficulty and technicality, but they also raise issues of fundamental importance concerning the desirable balance between the courts and government. For these reasons we would invite comments on these proposals both from the legal profession and the general public so that we can better perform our task when we report to Parliament on these issues.

APPENDIX A

Summary of Tentative Views

1. *Interaction with Provincial Courts*

1.1. The exclusive jurisdiction of the Federal Court to exercise judicial review over federal boards, commissions and tribunals should be continued.

1.2. However, the jurisdiction of the Federal Court to exercise judicial review over procedures to surrender criminals to Commonwealth and foreign countries and probably over any other criminal proceedings arising before provincial courts should be removed and left to the usual means of review before the provincial superior courts.

1.3. Apart from criminal matters, the Federal Court should as a general rule continue to exercise judicial review over judges of provincial courts, including provincial superior courts, when acting *persona designata* as federal boards, commissions or tribunals. Exceptions may be made when the provincial superior court judges are, because of their specific experience, more appropriate to exercise review jurisdiction. At times the better course is to remove the original jurisdiction from the provincial court judges.

1.4. Similar considerations as in 1.3 apply to situations where a provincial functionary acts *persona designata* as a federal board, commission or tribunal.

1.5. *Habeas corpus* jurisdiction should remain exclusively in the provincial superior courts.

2. *Court of Appeal and Trial Division Jurisdiction*

2.1. Our preferred general solution is that judicial review of all federal administrative authorities should originate in the Trial Division.

2.2. Trial Division judges should, however, have the discretion to transfer to the Court of Appeal cases that are important in their own right or raise important legal issues. Consideration should also be given to empowering the Court of Appeal to establish guidelines for the exercise of this discretion.

2.3. Specific judges of the Trial Division should be assigned to hear cases involving judicial review of administrative authorities to ensure that the cases are heard by judges familiar with administrative law and the federal administrative structure.

2.4. Our present orientation is that the special appeals now existing from some federal authorities should be repealed whenever they involve questions ordinarily raised on judicial review; special appeals involving review on the merits should be general appeals including questions normally subject to judicial review, so that in cases where a special right of appeal exists, there will be no necessity for relying on the general provisions for judicial review. (The Commission is currently having a study undertaken of these special appeals).

2.5. Federal administrative authorities should have a right (along the lines of section 28(4) of the *Federal Court Act*) to refer any question of law, jurisdiction, practice or procedure to the Trial Division.

2.6. Appeals from the Trial Division to the Court of Appeal should be by leave of the Trial Division or the Court of Appeal to ensure that the work of the Court of Appeal consists of cases of great importance in their own right or raise important questions of law.

2.7. Appeals from the Federal Court of Appeal to the Supreme Court of Canada should continue as in other cases to be with leave. To permit the Court of Appeal to develop its own jurisprudence, leave should as at present be only when that court considers it appropriate or the Supreme Court of Canada deems a question of sufficient importance or is otherwise of such a nature and importance as to warrant a decision by it.

2.8. Whether the general scheme above described is accepted or not, members of the Trial Division should, as a minimum, no longer act as unemployment umpires; this task should be assigned to a specialized administrative tribunal.

2.9. Similarly the immigration appeals should, as a minimum, be transferred to the Trial Division with the right to appeal as in other cases to the Court of Appeal.

3. *Grounds and Procedures for Review*

3.1. Judicial review should be initiated by a single application for review, whatever form of relief may be desired.

3.2. The grounds of review and the forms of relief should be expressly articulated in legislation.

3.3. The court should be enabled to review federal administrative authorities for action contrary to law, including without limiting the generality of the foregoing:

- denial of natural justice
- failure to observe prescribed procedures
- *ultra vires* action
- error in law
- fraud

- failure to reach a decision or to take action where there is a duty to do so
- unreasonable delay in reaching a decision or performing a duty
- lack of evidence to support a decision.

3.4. The court should be able to grant relief by way of

- an order quashing or setting aside a decision (which should include a report or recommendation)
- an order restraining proceedings without jurisdiction or any breach of natural justice or any breach of procedural requirements prescribed by statute or regulation
- an order compelling the exercise of jurisdiction or observance of natural justice or statutory or regulatory procedures
- an order referring the matter back for further consideration
- a mandatory order compelling action unlawfully withheld or unreasonably delayed
- an order declaratory of the rights of the parties
- such other order as may be necessary to do justice between the parties.

3.5. A decision should include a failure to make a decision. It should also include reports and recommendations that are likely to be acted upon.

3.6. The court should in the exercise of a judicial discretion have the power to dismiss an application for review at any time. This judicial discretion could be exercised when, for example, proceedings are vexatious, the grounds are trivial or non-existent, an order would be futile, or in the case of interlocutory matters, the issues could be more conveniently dealt with following a final decision of the tribunal.

4. *Administrative Action Subject to Judicial Review*

4.1. Judicial review, whether for illegality or unfair procedure, should continue to extend to all federal statutory authorities, whether they be Ministers, government officials or administrative bodies.

4.2. The Cabinet should continue to be subject to review for illegality, but not for unfairness. Relief against the Crown should continue to be by a declaration of rights, although consideration should be given to extending the interim injunction to the Crown. A similar régime would also seem appropriate for the Treasury Board. The other exceptions in section 28(6) of the *Federal Court Act* should be reconsidered to determine whether they continue to be necessary.

4.3. Future legislation providing for judicial review should avoid express use of the judicial/administrative classification of statutory powers to encourage the courts to avoid the tortuous rigours of this classification. Consideration should be given to legislation requiring or empowering the court to review administrative, as well as judicial and quasi-judicial, decisions for conformity with natural justice unless the public interest that decisions conform with natural justice is outweighed by another public interest, such as efficiency in government, national security, confidentiality, etc.

5. *Miscellaneous*

5.1. Privative clauses: The proposed new provisions of the *Federal Court Act* should have effect notwithstanding any other statute.

5.2. Reasons for Decisions: Administrative authorities should give candid reasons for decisions, indicating at least the general nature of the information relied on and withholding information only when absolutely necessary.

5.3. Standing: All parties and persons aggrieved should have standing in proceedings for judicial review, and the court should in addition have a discretion to grant standing to any person it feels may have a legitimate interest.

5.4. Stay of Proceedings: Proceedings before an administrative authority should continue following an application for judicial review unless stayed by the authority or the court. We would expect the court's power to be sparingly used.

5.5. Time to Apply and to Proceed: The periods for applying for, and proceeding with judicial review should be fairly short.

5.6. Damages: Consideration might be given to empowering the court to join an action for damages against the Crown or an administrative authority where such action might be brought under another section of the Act, if all the relevant facts are before the court.

APPENDIX B

Relevant Statutory Provisions

The *Federal Court Act*

Definitions "federal board, commission or other tribunal" «*office*, . . .

2. In this Act

"federal board, commission or other tribunal" means any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of *The British North America Act, 1867*;

Extraordinary remedies

18. The Trial Division has exclusive original jurisdiction

(*a*) to issue an injunction, writ of *certiorari,* writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(*b*) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

Review of decisions of federal board, commission or other tribunal

28. (1) Notwithstanding section 18 or the provisions of any other Act, the Court of Appeal has jurisdiction to hear and determine an application to review and set aside a decision or order, other than a decision or order of an administrative nature not required by law to be

made on a judicial or quasi-judicial basis, made by or in the course of proceedings before a federal board, commission or other tribunal, upon the ground that the board, commission or tribunal

(*a*) failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(*b*) erred in law in making its decision or order, whether or not the error appears on the face of the record; or

(*c*) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

When application may be made

(2) Any such application may be made by the Attorney General of Canada or any party directly affected by the decision or order by filing a notice of the application in the Court within ten days of the time the decision or order was first communicated to the office of the Deputy Attorney General of Canada or to that party by the board, commission or other tribunal, or within such further time as the Court of Appeal or a judge thereof may, either before or after the expiry of those ten days, fix or allow.

Trial Division deprived of jurisdiction

(3) Where the Court of Appeal has jurisdiction under this section to hear and determine an application to review and set aside a decision or order, the Trial Division has no jurisdiction to entertain any proceeding in respect of that decision or order.

Reference to Court of Appeal

(4) A federal board, commission or other tribunal to which subsection (1) applies may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Court of Appeal for hearing and determination.

Hearing in summary way

(5) An application or reference to the Court of Appeal made under this section shall be heard and determined without delay and in a summary way.

Limitation on proceedings against certain decisions or orders

(6) Notwithstanding subsection (1), no proceeding shall be taken thereunder in respect of a decision or order of the Governor in Council, the Treasury Board, a superior court or the Pension Appeals Board or in respect of a proceeding for a service offence under the *National Defence Act*.

Where decision not to be restrained

29. Notwithstanding sections 18 and 28, where provision is expressly made by an Act of the Parliament of

Canada for an appeal as such to the Court, to the Supreme Court, to the Governor in Council or to the Treasury Board from a decision or order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except to the extent and in the manner provided for in that Act.

Appeals under other Acts

30. (1) The Court of Appeal has exclusive original jurisdiction to hear and determine all appeals that, under any Act of the Parliament of Canada except the *Income Tax Act,* the *Estate Tax Act* and the *Canadian Citizenship Act,* may be taken to the Federal Court.

Transfer of jurisdiction to Trial Division

(2) Notwithstanding subsection (1), the Rules may transfer original jurisdiction to hear and determine a particular class of appeal from the Court of Appeal to the Trial Division.

Appeal with leave of Court of Appeal

31. (2) An appeal to the Supreme Court lies with leave of the Federal Court of Appeal from a final or other judgment or determination of that Court where, in the opinion of the Court of Appeal, the question involved in the appeal is one that ought to be submitted to the Supreme Court for decision.

Appeal with leave of Supreme Court

(3) An appeal lies to the Supreme Court from a final or other judgment or determination of the Federal Court of Appeal, whether or not leave to appeal to the Supreme Court has been refused by the Federal Court of Appeal, where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in such question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from such judgment or determination is accordingly granted by the Supreme Court.

Exceptions

40. No appeal to the Supreme Court lies under section 38 or 39 from a judgment in a criminal cause, in proceedings for or upon a writ of *habeas corpus, certiorari* or prohibition arising out of a criminal charge, or in proceedings for or upon a writ of *habeas corpus* arising out of a claim for extradition made under a treaty.

APPENDIX C

Selected Bibliography on Judicial Review[1]

(with special reference to the Federal Court)

I. COMMISSION BACKGROUND PAPER

Mullan, David J. *The Federal Court—A Study Paper on its Administrative Law Jurisdiction,* Ottawa: Law Reform Commission of Canada, 1977 (In publication).

II. REPORTS

Law Commission, *Remedies in Administrative Law* (Working Paper No. 40), London: H.M.S.O., 1971.

Law Commission, *Report on Remedies in Administrative Law,* London: H.M.S.O., 1976 (Cmnd. 6407).

Report of the Committee of Review on Prerogative Writ Procedures, (Ellicott Report), Canberra: Government Printer of Australia, 1973.

Report of the Commonwealth Administrative Review Committee, (Kerr Report), Canberra: Commonwealth Government Printing Office, 1971.

Report of the Royal Commission of Inquiry into Civil Rights (McRuer Report), Toronto: Queen's Printer, 1968.

Victoria Statute Law Revision Committee, *Report on Appeals from Administrative Decisions,* Melbourne: Government Printer, 1968.

III. BOOKS AND ARTICLES

BRUN, Henri, "Le contrôle judiciaire des décisions interlocutoires des autorités administratives" (1976), 54 *Canadian Bar Review* 590.

DAVIS, K. C., *Administrative Law Treatise,* Saint Paul: West Publishing Co., 1958.

de SMITH, S. A., *Jucidial Review of Administrative Action,* London: Stevens and Sons, 3rd edition, 1973.

FERA, Norman, "Judicial Review under Sections 18 and 28 of the Federal Court Act" (1975), 21 *McGill Law Journal* 255.

[1] A more complete bibliography appears in the Commission's Background Paper.

JACKETT, W. R., *The Federal Court of Canada—A Manual of Practice*, Ottawa: Information Canada, 1971.

LEMIEUX, Denis and VALLIÈRES, Nicole, "Le fondement constitutionnel du pouvoir de contrôle judiciaire exercé par la Cour fédérale du Canada" (1975), 2 *Dalhousie Law Journal* 268.

LEMIEUX, Denis and VALLIÈRES, Nicole, "La compétence de la Cour fédérale comme organisme bidivisionnel de contrôle judiciaire" (1976), 17 *Cahiers de droit* 379.

MULLAN, David, "The Federal Court Act: A Misguided Attempt at Administrative Law Reform" (1973), 23 *University of Toronto Law Journal* 14.

MULLAN, David J., "Fairness, the New Natural Justice" (1975), 25 *University of Toronto Law Journal* 281.

NICHOLLS, G. V. V., "Federal Proposals for Review of Tribunals Decisions" (1970), 18 *Chitty's Law Journal* 254.

PEPIN, Gilles, "Le contrôle judiciaire de l'Administration et la Loi concernant la Cour fédérale du Canada" (1971), 31 *Revue du Barreau* 256.

PEPIN, Gilles, "Quelques observations générales sur la question du caractère efficace ou illusoire du contrôle judiciaire de l'activité de l'administration" (1976), 36 *Revue du Barreau* 453.

WADE, H. W. R., *Administrative Law*, Oxford: Clarendon Press, 3rd edition, 1971.

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